

SERVICE DATE - JULY 1, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-848

MAINE CENTRAL RAILROAD COMPANY
STATE OF NEW HAMPSHIRE
–ADVERSE DISCONTINUANCE–
LINE BETWEEN WHITEFIELD, NH AND ST. JOHNSBURY, VT

Decided: June 26, 2003

By petitions filed on December 10, 2002, and February 20, 2003, the Maine Central Railroad Company (MEC) and the State of New Hampshire, Department of Transportation (State) (jointly, applicants) seek exemptions from three statutory provisions and waivers from several of our regulations that would otherwise require them to file certain information in a discontinuance application they intend to file.¹ Applicants plan to file an adverse application under 49 U.S.C. 10903 requesting the Board to find that the public convenience and necessity require or permit the Lamoille Valley Railroad Company (LVRC) and its designee, the Twin State Railroad Corporation (TSR), to discontinue operations over approximately 28.15 miles of a rail line between Whitefield, NH, and St. Johnsbury, VT. TSR replied to the exemption and waiver requests on January 7, 2003, and

¹ A petition for exemption and waiver was originally filed by MEC on December 10, 2002. At that time, MEC owned the entire line. On December 30, 2002, however, MEC sold to the State an 8.36-mile segment of the line, located between Whitefield, NH, and Gilman, VT, subject to LVRC's and TSR's operating rights. State of New Hampshire Department of Transportation–Acquisition and Operation Exemption–Certain Assets of Maine Central Railroad Company, STB Finance Docket No. 34307 (STB served Jan. 22, 2003 (68 FR 3093)). On January 17, 2003, MEC and the State requested that the State be substituted as a party in the waiver petition for the segment of the line that it had acquired. The request will be granted.

On February 20, 2003, MEC and the State jointly filed an updated exemption and waiver request. This request includes all of the exemptions and waivers originally sought in MEC's December 10 pleading, plus certain new exemption and waiver requests.

March 10, 2003.² The requests will be granted to the extent specified in this decision.

According to applicants, TSR has been operating the line under a lease agreement with MEC since 1984.³ Applicants claim that TSR has not provided service on the line since October 1999, and has not made any effort to solicit traffic or reinstitute service. Applicants allege that the line has not been maintained as required by the lease agreement for several years. According to applicants, if the application is approved and the Board's exclusive jurisdiction terminates, the State will seek removal of the interests of LVRC and TSR under state law and obtain a new operator to provide service on the Whitefield to Gilman line segment. MEC indicates that it will provide service on the remainder of the line between Gilman and St. Johnsbury.

In their petitions, applicants maintain that much of the information that the Board requires for a discontinuance application is inapplicable or irrelevant to the issues involved in an adverse application for a line that is out of service. Applicants also claim that they do not have the information required by the regulations they seek to have waived because they have not operated the line.

² In its March 10, 2003 reply, TSR moved to strike applicants' updated exemption and waiver request, claiming that the updated request seeks the same relief as MEC's original petition. TSR argues that it should not be put to the burden of filing multiple responses to a procedural matter. The motion will be denied. The updated exemption and waiver request is appropriate because it reflects the State's purchase of a portion of the line and the State's joinder as an applicant.

³ That lease was approved by the Board's predecessor agency, the Interstate Commerce Commission (ICC), in Guilford Transportation Industries, Inc.—Control—Boston and Maine Corporation, Finance Docket No. 29720 (Sub-No. 1) (ICC served May 22, 1984). The ICC's decision indicated that the lease resulted from a settlement agreement between Guilford Transportation Industries (Guilford), MEC, the State of Vermont and LVRC, regarding protective conditions, and ended litigation challenging Guilford's control of MEC in the cited decision. The decision also noted that LVRC's parent, Northern Vermont Corporation, created TSR to operate the line. LVRC currently operates a 98-mile line between Swanton, VT, and St. Johnsbury, VT, where it connects with the line at issue here.

TSR objects generally to all of the exemptions and waivers sought here.⁴ In particular, TSR opposes applicants' requests to waive the requirements of 49 CFR 1152.22(c) and 49 CFR 1152.22(d).

DISCUSSION AND CONCLUSIONS

Exemptions. Pursuant to 49 U.S.C. 10502, applicants have requested exemptions from the posting requirements of 49 U.S.C. 10903(a)(3)(B) and the system diagram map (SDM) requirements of 49 U.S.C. 10903(c)(2). TSR does not specifically oppose these requests. These provisions are designed to apply to rail carriers that are proposing voluntarily to discontinue their own service over a line. It is not feasible or necessary for third party applicants seeking an adverse discontinuance to comply with them. Thus, the requested exemptions will be granted.

Applicants also seek an exemption from the offer of financial assistance (OFA) requirements of 49 U.S.C. 10904. By filing an application for adverse discontinuance, the applicant asks the Board to withdraw its primary jurisdiction so that the applicant can invoke state law to have the carrier removed from the line. To do so, the Board must find that the public interest justifies removal of the Board's jurisdiction. To permit the filing of an OFA after granting an adverse discontinuance would defeat the Board's conclusion that the public interest justified the withdrawal of its jurisdiction. On the other hand, if the Board denies the application for the adverse discontinuance, no OFA may be filed. Section 10904 therefore serves no useful purpose in this case. The sought exemption will be granted.

Application of the statutory provisions in 49 U.S.C. 10903(a)(3)(B), 49 U.S.C. 10903(c)(2) and 49 U.S.C. 10904 to this transaction is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101. Rather, exemption will promote that policy by eliminating unnecessary procedures, and thus will expedite regulatory decisions [49 U.S.C. 10101(2)], foster sound economic conditions in transportation [49 U.S.C. 10101(5)], and encourage efficient management of railroads [49 U.S.C. 10101(9)]. Other aspects of the rail transportation policy will not be adversely affected.

⁴ TSR claims that the adverse discontinuance proceeding is merely an attempt to violate the terms of the 1984 settlement mentioned in footnote 2, supra. This argument will be addressed in the decision on the merits. TSR asserts that it has met its obligations as a common carrier and leaseholder on the line. According to TSR, the only shipper it has served since it began operating the line was a paper mill located at Gilman, VT, that generated approximately 800 carloads per year. TSR states that the mill was sold in October 1999, and that the current owner has not requested rail service. TSR claims that, although there are no shippers currently on the line, it continues to maintain the line as required by the lease and is prepared to respond to service requests should traffic conditions change and service is required in the future.

Waivers. In appropriate instances, such as situations involving adverse discontinuance applications, the Board, like the ICC, has granted waivers of inapplicable or unneeded portions of the abandonment and discontinuance regulations. Chelsea Property Owners – Abandonment – Portion of Consolidated Rail Corporation's West 30th Street Secondary Track in New York, NY, Docket No. AB-167 (Sub-No. 1094) (ICC served July 19, 1989); Grand Trunk Western Railroad Incorporated–Adverse Discontinuance of Trackage Rights Application–A Line of Norfolk and Western Railway Company in Cincinnati, Hamilton County, OH, Docket No. AB-31 (Sub-No. 30) (STB served Feb. 12, 1998); City of Rochelle, Illinois–Adverse Discontinuance–Rochelle Railroad Company, STB Docket No. AB-549 (STB served June 5, 1998); and CSX Corporation and CSX Transportation, Inc.–Adverse Abandonment Application–Canadian National Ry. Co. and Grand Trunk Western RR, Inc., STB Docket No. AB-31 (Sub-No.38) (STB served Mar. 2, 2001) (CSX–Adverse Abandonment). Applicants assert that much of the information required by the regulations they want waived is irrelevant to an adverse discontinuance application.

Applicants seek waiver of the filing, service, posting and publication requirements in 49 CFR 1152.20(a)(1), (2), (3) and (4) and 49 CFR 1152.20(b)(1) and (2), the SDM requirements in 49 CFR 1152.22(a)(5) and 49 CFR 1152.10-14, and the OFA regulations in 49 CFR 1152.27.⁵ In addition to seeking a waiver from the requirements of 49 CFR 1152.20(a)(1), applicants seek a determination that their petition for waiver satisfies the intent of that regulation, which requires an applicant to file a notice that it intends to discontinue service. TSR does not oppose these waiver requests.

The Board has not granted authority to abandon the line. Notice to the parties who would be directly affected by the removal of the present operator of the line (and by the substitution of a new one), as well as notice to the public, is therefore appropriate. Applicants must comply with notice and publication requirements in 49 CFR 1152.20(a)(1), (2), and (4) and 49 CFR 1152.20(b)(1) and (2). Because the applicants are not currently in possession of the line, however, waiver of the posting requirement at 49 CFR 1152.20(a)(3) is appropriate. Also, the SDM requirements in 49 CFR 1152.22(a)(5) and 49 CFR 1152.10-14 are not relevant to an adverse discontinuance application. Therefore, they will be waived.

Applicants also seek waiver of: (1) 49 CFR 1152.22(c), requiring a description of the service performed on the line during the base year; (2) 49 CFR 1152.22(d), requiring revenue and cost data; and (3) 49 CFR 1152.22(e), requiring information about rural and community impact, significant users, and transportation alternatives. Applicants assert that only the operator of the line can provide the information required by these provisions of the Board's regulations and, because the applicants do not

⁵ Because the Board is granting an exemption from the statutory provisions of 49 U.S.C. 10904, adherence to the regulations implementing that provision would serve no purpose and the waiver request will be granted.

operate the line, they do not have most of the information. They acknowledge that the lease agreement gives MEC the exclusive right to deal directly with shippers and receivers and to solicit traffic. The applicants indicate, however, that although MEC, TSR, and LVRC had previously shared information about actual and potential traffic, in recent years that practice has been limited. Applicants argue that TSR and LVRC are obligated to maintain the line under the lease agreement and can provide information about the costs they incurred.

TSR opposes the request to waive the requirements in 49 CFR 1152.22(c) for information about the service provided and the reasons for the decline in traffic. TSR disputes that it is to blame for the decline in traffic, noting that, under the lease agreement, MEC had the exclusive right to deal directly with shippers and receivers on the line and to solicit traffic. According to TSR, MEC has a substantial responsibility for any decline in traffic and should provide information about why traffic declined. TSR states that, if MEC is aware of any potential new traffic on the line, it has not shared that information with TSR.

TSR also disagrees with applicants' request to waive revenue and cost data required by 49 CFR 1152.22(d). Noting that the applicants are seeking an adverse discontinuance to enable a new operator to conduct viable freight operations, TSR asserts that applicants should provide projected revenues and costs to support their assertion that the line can be viable. TSR also asserts that applicants should submit cost evidence to substantiate their claim that the line had not been maintained as required by the lease agreement.

Applicants need not comply with the requirements in 49 CFR 1152.22(c) and (d), except as noted. This information might be relevant to the Board's decision, as TSR suggests, but they say that they do not possess the information. Moreover, the line has not been operated for more than 3 years, so no current data are available. In any event, applicants here have the burden of proof and may make whatever arguments they choose in support of their application. If TSR believes that evidence of its costs, revenues and services is relevant, that carrier has that information and may submit it.

Applicants propose to restore service. Presumably, they have made revenue and cost projections because they have asserted that the line can be viable. They should provide the Board with these projections, if they have them.

Applicants will be required to provide the information required by 49 CFR 1152.22(e) on the impact of the proposed adverse discontinuance on affected communities and rural areas. That information will be relevant to the Board's decision.

The environmental reporting requirements of 49 CFR 1105 will be waived. Applicants do not propose to abandon service or contemplate salvage activities, but instead propose to substitute a new

rail carrier for the current carrier. Under these circumstances, the proposal would not result in significant changes that exceed the thresholds set forth in 49 CFR 1105.7(e)(4) and (5). Therefore, environmental and historic reporting documentation would not be necessary due to 49 CFR 1105.6(c)(2) and 1105.8(b)(1).

The applicants are reminded that they have the burden to support their case with relevant evidence to show that it is in the public interest to terminate TSR's operating authority so that a new operator can provide service.

In sum, the petition for exemption and waiver will be granted in part and denied in part.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The State's substitution request is granted.
2. TSR's motion to strike the updated exemption and waiver request is denied.
3. The petition for exemption and waiver is granted in part and denied in part as described above.
4. This decision is effective on its service date.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary